Supreme Court, U.S.
FILED

03-388 SEP 9 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DENNIS BATES; JIMMY BURSON; BENNY JUDAH, doing business as CLEARWATER FARMS; TOMMY COLEMAN; RICHARD COX; WAYNE DAVIS; NEIL FRIESSEN; JAKE FORESE; THOMAS FUSTON; ARTHUR GALVAN, doing business as G-5 PARTNERSHIP; GREG HUGHES; SANDRA AND KARL DON HUGHES doing business as JH CATTLE CO.; RUDY KLASSEN; RONNIE LOVE; KEVIN MATHIS; BRAD PALMER; KIRK PARRISH, doing business as K-L FARMS; JERRY PARRISH; JoEVELYN PATTERSON and DONALD GRUBEN; STACEY PRICE; BENNY JUDAH doing business as PROGRESSIVE FARMS; MORRIS RUSHING, doing business as PEA-COT FARMS; BILLY SHANNON, FLOYD STOKES; CRAIG WEST; FRENCHIE LEE WHEELER

Petitioners,

v.

DOW AGROSCIENCES LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PHIL WATKINS
BETH W. SQUIRES
PHIL WATKINS, P.C.
700 North St. Mary's Street
Suite 1750
San Antonio, Texas 78205
(210) 225-6666

KIMBERLY S. KELLER
Counsel of Record
THE KELLER GROUP
14302 Ben Brush Lane
San Antonio, Texas 78248
(210) 857-5267

Attorneys for Petitioners

QUESTION PRESENTED

Which, if any, state law crop injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-137?

STATEMENT PURSUANT TO RULE 29.6

None of the corporate Petitioners has a parent company and no publicly held company owns 10% or more of the stock of any such corporate Petitioner.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xiii
Opinions Below	1
Statement of the Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Petition	3
I. Introduction	3
II. History of FIFRA	6
A. Relevant Provisions	7
B. Legislative History	8
C. Administrative Commentary	11
III. This Court Should Grant Review to Reconcile the "Jurisprudential Mare's Nest" Regarding Whether FIFRA Preempts State Law Tort Claims.	12

Contents

		Page
	A. Pre-*Cipollone* FIFRA Case Law	13
	B. *Cipollone v. Liggett Group, Inc.*	13
	C. Post-*Cipollone* FIFRA Case Law	14
	D. *Medtronic, Inc. v. Lohr*	16
	E. Post-*Medtronic* FIFRA Case Law	16
IV.	This Court Should Grant Review to Clarify the Proper Analysis in Determining Which, if Any, State Tort Claims Are Preempted by FIFRA.	19
	A. The Common Aims Test	19
	B. The Efficacy Test	22
	C. The Risk-Utility Test	22
	D. The Label-Based Test	24
	E. The Inducement Test	25
V.	The Particular Disposition and Facts of This Case Present This Court with the Opportunity to Finally Resolve the Conflict Surrounding FIFRA's Preemption Clause.	27
Conclusion		30

TABLE OF CITED AUTHORITIES

Page

Cases:

Am. Cyanimid Co. v. Geye, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003) ..... *passim*

Andrus v. AgrEvo USA Co., 178 F.3d 395 (5th Cir. 1999) ..... *passim*

Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993) 4, 14, 15, 24

Arnold v. Dow Chem. Co., 110 Cal. Rptr. 2d 722 (Cal. Ct. App. 2001) 19

Bice v. Leslie's Pool Mart, Inc., 39 F.3d 887 (8th Cir. 1994) 15

Brown v. Chas. H. Lilly Co., 985 P.2d 846 (Or. Ct. App. 1999) 19, 21

Burke v. Dow Chem. Co., 797 F. Supp. 1128 (E.D.N.Y. 1992) 15

Chem. Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941 (9th Cir. 1992) 25

Ciba-Geigy Corp. v. Alter, 834 S.W.2d 136 (Ark. 1992) 6, 21

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) ..... *passim*

Cox v. Velsicol Chem. Corp., 704 F. Supp. 85 (E.D. Pa. 1989) 13

Page

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 8

Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 (Cal. 2000) ..... *passim*

Eyl v. Ciba-Geigy Corp., 650 N.W.2d 744 (Neb. 2002), *cert. denied*, 123 S. Ct. 2646 (2003) 18

Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984) ..... *passim*

Fisher v. Chevron Chem. Co., 716 F. Supp. 1283 (W.D. Mo. 1989) 15

Grenier v. Vt. Log Bldgs., Inc., 96 F.3d 559 (1st Cir. 1996) 4, 14

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 9

Gorton v. Am. Cyanamid Co., 533 N.W.2d 746 (Wis. 1995) 24, 25

Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244 (3d Cir. 1999) 4, 17, 24

Jack v. Orkin Exterminating Co., No. 97-CV-7012 (JG), 2001 WL 25641 (E.D.N.Y. Jan. 5, 2001) .. 17

Johnson v. Monsanto Chem. Co., 129 F. Supp. 2d 189 (N.D.N.Y. 2001) 17

Page

King v. E.I. Dupont De Nemours & Co., 996 F.2d 1346 (1st Cir. 1993) 14

Kuiper v. Am. Cyanamid Co., 131 F.3d 656 (7th Cir. 1997) 4, 24, 25

Lowe v. Sporicidin Int'l, 47 F.3d 124 (4th Cir. 1995) 4, 24

Lowe's Home Centers, Inc. v. Olin Corp., 313 F.3d 1307 (11th Cir. 2002) 16

MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994) 25, 26

Mann v. H.W. Anderson Prods., Inc., 676 N.Y.S.2d 658 (N.Y. App. Div. 1998) 21

McAlpine v. Rhone-Poulenc Ag. Co., 16 P.3d 1054 (Mont. 2000) 17, 20

McAlpine v. Rhone-Poulenc Ag. Co., 947 P.2d 474 (Mont. 1997) 17-18, 19, 20

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) .... *passim*

Nathan Kimmel, Inc. v. DowElanco, 64 F. Supp. 2d 939 (C.D. Cal. 1999) 17

Nat'l Bank of Commerce, of El Dorado, Ark. v. Dow Chem. Co., 165 F.3d 602 (9th Cir. 1999) 16

Netland v. Hess & Clark, Inc., 284 F.3d 895 (8th Cir. 2002), *cert. denied*, 537 U.S. 949 (2002) 4, 6, 28

Page

Papas v. Upjohn Co., 985 F.2d 516 (11th Cir. 1993) 4, 15, 24

Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991), *vacated sub nom.* 505 U.S. 1215 (1992) 15

Papike v. Tambrands Inc., 107 F.3d 737 (9th Cir. 1997) 23

Quest Chem. Corp. v. Elam, 898 S.W.2d 818 (Tex. 1995) 18

Roberts v. Dow Chem. Co., 702 F. Supp. 195 (N.D. Ill. 1988) 21

Ruiz-Guzman v. Amvac Chem. Corp., No. 98-35088, 2000 WL 1763212 (9th Cir. Nov. 28, 2000) 22, 23

Ruiz-Guzman v. Amvac Chem Corp., 7 P.3d 795 (Wash. 2000) 23

Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993) 14, 24

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 9

Sleath v. W. Mont Home Health Servs., Inc., 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom. Dow Agrosciences LLC v. Sleath*, 534 U.S. 814 (2001) ..... *passim*

Sprietsma v. Mercury Marine, 123 S. Ct. 518 (2002) 12

Page

Sullivan v. Stroop, 496 U.S. 478 (1990) 12

Sun Valley Packing v. Consep, Inc., 114 Cal. Rptr. 2d 237 (Cal. Ct. App. 2001) 17, 19

Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 4, 6, 15, 17

Tyler v. Dow Chem. Co., Inc., 683 N.Y.S.2d 619 (N.Y. App. Div. 1998) 19

Villari v. Terminix Int'l, Inc., 692 F. Supp. 568 (E.D. Pa. 1988) 21

Welchert v. Am. Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995) 15

Wilson v. Chevron Chem. Co., 1986 WL 14925 (S.D.N.Y. Dec. 17, 1986) 13, 21

Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 6, 8, 10

Worm v. Am. Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) 26

Wright v. Dow Chem. U.S.A., 845 F. Supp. 503 (M.D. Tenn. 1993) 15

Yee v. City of Escondido, 503 U.S. 519 (1992) 29

Page

Statutes:

7 U.S.C. § 136-137 ..... i, 7

7 U.S.C. § 136a(c)(5) 7

7 U.S.C. § 136a(d)(1)(C) 23

7 U.S.C. § 136(bb) 23

7 U.S.C. § 136v 1

7 U.S.C. § 136v(a) 8

7 U.S.C. § 136v(b) 3, 4, 8,14

15 U.S.C. § 1334(a) 13

15 U.S.C. § 1334(b) 14

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2201 29

Legislative History:

H.R. REP. No. 92-511 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3993 10

S. REP. No. 92-838 (Supplemental Report) (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993 10

S. REP. No. 92-970 (1972), *reprinted in* 1972 U.S.S.C.A.N. 3993 10

Page

H.R. CONF. REP. No. 92-1540, *reprinted in* 1972 U.S.C.C.A.N. 3993 10

H.R. REP. No. 95-343 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1974 7

H.R. REP. No. 95-663 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1991 7

Federal Environmental Pesticide Control Act of 1971: Hearings Before the House Comm. on Agric., 92nd Cong. 8 (1971) 9

Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on Agric. Research of the Sen. Comm. on Agric. and Forestry, 92nd Cong. (1971) 9-10

Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on Agric. Research of the Sen. Comm. on Agric. and Forestry, 92nd Cong. (1972) 9

Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on the Envt. of the House Comm. on Commerce, 92nd Cong. (1972) 9

Regulations for the Enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act; Proposed Registration, Reregistration, and Classification Procedures, 47 Fed. Reg. 40,659 (Sept. 15, 1982) 11

Page

Amicus Briefs:

Brief of Amicus Curiae the United States on Petition for a Writ of Certiorari, *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003) (No. 02-367) 5, 7, 21, 28

Brief of Amicus Curiae the United States, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 846 (Cal. 2000) (No. 98-127) ..... *passim*

Brief of Amicus Curiae the United States, *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000) (No. 98-60496) 21

Other Authorities:

RESTATEMENT (THIRD) OF TORTS § 2 cmt. f, at 24 (1998) 23

OFFICE OF PESTICIDE PROGRAMS, U.S. EVTL. PROT. AGENCY, PESTICIDE REGULATION NOTICE 96-4 (June 3, 1996) 4

CAROLINE S. GLEATON & CARL G. ANDERSON, *Facts About Texas & U.S. Agriculture*, The Texas Cooperative Extension, Dept. of Agricultural Economics, The Texas A&M University System (2002) 5

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed June 11, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of Texas, Lubbock Division Dated And Filed June 3, 2002 ..... 21a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Cummings, D.J.) granting respondent's summary judgment motion (Appendix ("Pet. App.") 21a-31a) is published at 205 F. Supp. 2d 623. The opinion of the court of appeals (per Feldman, D.J. (District Judge of the Eastern District of Louisiana, sitting by designation), joined by Garwood and Higginbotham, JJ.) affirming (Pet. App. 1a-20a) is published at 332 F.3d 323.

STATEMENT OF THE JURISDICTION

The court of appeals entered its order and opinion on June 11, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 136v provides as follows:

> **Authority of States**
>
> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> **(b) Uniformity**
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

STATEMENT OF THE CASE

The need for clarification by this Court in this area of federal preemption has never been more evident than in the facts presented by this case. Petitioners are farmers from west and northwest Texas who purchased and applied Strongarm to prevent weeds in their peanut crops. Strongarm, a recently

released herbicide manufactured by Dow Agrosciences LLC ("Dow"), was the only herbicide applied to the farmers' crops in the 2000 growing season. After each farmer experienced stunted peanut growth and reduced crop yield, they retained counsel to prepare a state lawsuit in the various counties where the farmers resided. Pretrial discovery indicated that Strongarm causes injury to peanut roots in soils with pH levels of 7.0 or greater, and that before the herbicide's release, Dow was aware of the harmful effect of applying Strongarm to peanuts grown in the high pH-level soils of Texas, New Mexico, and Oklahoma.

The Texas Deceptive Trade Practices Act ("DTPA") governs such claims and requires a plaintiff to give a defendant sixty days notice of the complaint before filing suit. After receiving the notice required by state law, and during the sixty day period in which the farmers' were prohibited from filing suit, Dow filed a declaratory judgment action in federal district court in Lubbock, Texas for the sole purpose of declaring the validity of its affirmative defenses. The farmers contested the federal court's jurisdiction and filed a motion to dismiss. Upon denial of that motion, the farmers filed a counterclaim, raising the state law tort claims of breach of warranty, fraud, defective design, negligence, and violations of the DTPA against Dow. The district court dismissed the farmers' claims on motion for summary judgment by Dow, finding the state law tort claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

The farmers appealed the ruling to the United States Court of Appeals for the Fifth Circuit, arguing that the district court lacked jurisdiction and that FIFRA did not preempt their state law tort claims. The Fifth Circuit affirmed. Regarding the jurisdiction challenge, the court held that jurisdiction was proper because the amount in controversy for each farmer exceeded $75,000. The court also held that although Dow engaged in some degree of forum shopping, the district court correctly conducted its abstention analysis under the Declaratory Judgment Act. Regarding the FIFRA issue, the Fifth Circuit

held that because liability on these claims would induce Dow to change its product or label, the farmers' causes of action were label-related and thus, expressly preempted.

The farmers respectfully petition this Court to review the holding of the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully request this Court grant their Petition for Writ of Certiorari to clarify the confusion surrounding the preemption clause in FIFRA. Relevant case law conflicts in two ways. First, federal and state courts are at odds regarding whether FIFRA's preemption clause, found at 7 U.S.C. § 136v(b), preempts state law tort claims. Second, among the courts holding that FIFRA does preempt tort claims, there exists disagreement as to the appropriate analysis to apply in determining which, if any, tort claims are preempted by the clause. The lack of clarity has left the judiciary struggling to interpret the ambiguous statutory language. After two decades of conflicting case law, the issue has sufficiently percolated throughout the judicial system without resolution, necessitating guidance from this Court.

I. *Introduction*

This case presents this Court with the proper disposition and set of facts with which it may resolve the plethora of contradictory case law regarding the scope of the preemption clause in FIFRA. Since Congress enacted FIFRA, the judiciary has struggled to interpret the preemption provision, section 136v, leading to a "jurisprudential mare's nest."[1] These opinions, attempting to apply this Court's mandates in *Cipollone v. Liggett*

1. A substantial body of federal and state case law conflicts on the issue of whether FIFRA completely preempts tort law claims. *Compare Dow Agrosciences LLC v. Bates*, 332 F.3d 323, 333 (5th Cir. 2003) (holding FIFRA preempts state law tort claims), and *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366 (Cal. 2000) (same), *with Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984) (holding FIFRA does not preempt state law tort claims), *and Am. Cyanimid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002) (same).

Group, Inc., 505 U.S. 504 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), have resulted in a vast array of holdings and a variety of analyses applied in the interpretation of the FIFRA preemption clause. A majority of federal courts hold that FIFRA preempts state law tort claims,[2] while many state courts, protective of their common law claims, hold the opposite.[3] In essence, the confusion surrounding FIFRA has pitted federal judges against state judges.

The long-standing controversy over the breadth of FIFRA's preemption clause prompted the Environmental Protection Agency ("EPA"), the agency authorized to enforce FIFRA, to speak out as to its interpretation of Congress's intent. OFFICE OF PESTICIDE PROGRAMS, U.S. EVTL. PROT. AGENCY, PESTICIDE REGULATION NOTICE 96-4 (June 3, 1996). When its voice went unheeded, the EPA entered the judicial fray by filing an amicus brief in conjunction with the Office of the Solicitor General.[4] In this brief, the EPA and the Solicitor General aligned with the state courts calling for a narrow interpretation of FIFRA's preemption clause. Recently, however, the Solicitor General

2. Several circuit courts have held that section 136v(b) expressly preempts any label-related damages claims, including those based upon failure to warn. *See Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vt. Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

3. *See, e.g., Geye*, 79 S.W.3d at 29; *Sleath v. W. Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom. Dow Agrosciences LLC v. Sleath*, 534 U.S. 814 (2001).

4. Brief of Amicus Curiae the United States, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 846 (Cal. 2000) (No. 98-127) (filed on behalf of the EPA and the Environment and Natural Resources Division of the U.S. Department of Justice).

alone filed an amicus brief, asserting that it had changed its position and that it agreed with the majority of federal cases holding that FIFRA preempts state law tort claims for failure to warn. *See* Brief of Amicus Curiae the United States on Petition for a Writ of Certiorari, *Am. Cyanamid Co. v. Geye, cert. denied*, 123 S. Ct. 2637 (2003) (No. 02-367). The federal and state judiciary, along with manufacturers, retailers, and consumers of pesticides, are equally perplexed as to whether FIFRA preempts state law tort claims. This confusion leads to harm across jurisdictional lines in every state.

The need for review by this Court is underscored by the legal landscape in Texas, one of the largest agricultural-production states.[5] The opinion handed down by the Fifth Circuit in this case directly contradicts the opinion of the Supreme Court of Texas. In 2002, the Supreme Court of Texas ruled that FIFRA does not preempt the crop injury claims of strict liability, breach of express and implied warranty, and other violations of the Texas Deceptive Trade Practices Act. *See Geye*, 79 S.W.3d at 29. Importantly, the *Geye* opinion pitted Texas against another agricultural production giant, the State of California, which previously ruled that such claims were preempted by FIFRA. *Etcheverry*, 992 P.2d at 377. In the case before this Court, the Fifth Circuit rejected the analysis of the Supreme Court of Texas in *Geye* and held that FIFRA preempts the same crop injury claims. *Bates*, 332 F.2d at 330 (5th Cir. 2003).

Accordingly, as the law stands in the State of Texas, a plaintiff suing in state court is permitted to proceed on crop damage claims, whereas had the plaintiff filed the same suit in federal court or should the case be removed, the claims are preempted as a matter of law. As a result, plaintiffs and defendants alike are encouraged to forum shop because venue

5. CAROLINE S. GLEATON & CARL G. ANDERSON, *Facts About Texas & U.S. Agriculture*, The Texas Cooperative Extension, Dept. of Agricultural Economics, The Texas A&M University System (2002) (stating that California and Texas lead the nation in farm receipts and market value of agricultural products sold).

of the suit is outcome determinative. Furthermore, the problems caused by forum shopping are compounded due to the unique facts of this case, where Dow relied on the Declaratory Judgment Act to forum shop and "strike first," securing the favorable federal venue during the time the farmers complied with the state law requirements of providing Dow with sixty days notice of their claims. *Bates*, 332 F.3d at 324.

Texas is not the only state to suffer from conflicting FIFRA jurisprudence. *Compare Sleath*, 16 P.3d at 1042 (Mont. 2001) (holding FIFRA does not preempt Montana state law damages actions), *and Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992) (recognizing that strict liability, negligence, breach of warranty, and misrepresentation causes of action under Arkansas state law not preempted by FIFRA), *with Taylor*, 54 F.3d at 562 (9th Cir. 1995) (preempting state law tort claims for strict liability, negligent testing, and breach of warranty), *and Netland*, 284 F.3d 899-900 (8th Cir. 2002) (finding preemption of state law strict liability, negligence, and failure to warn claims). Until this Court provides guidance to define where FIFRA falls in the continuum between its holdings in *Cipollone* and *Medtronic*, all parties involved in pesticide manufacturing, selling, and usage will suffer from the maze of conflicting case law. Moreover, throughout this time of confusion, FIFRA's goals of uniformity and protection of health are eviscerated. The farmers respectfully request this Court grant this Petition for Writ of Certiorari to resolve the conflict created by the lower courts.

II. *History of FIFRA*

FIFRA was originally passed as a "labeling statute" in 1947. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). Since that time, Congress has strengthened the provisions of FIFRA to address health and safety concerns regarding pesticides. *Id.* The current version of FIFRA effectuates a regulatory scheme authorizing the EPA to control the labeling, marketing, and selling of pesticides. *Id.*

A. Relevant Provisions

Under FIFRA, a pesticide may not be sold in the United States until it is registered with and its labels approved by the EPA. 7 U.S.C. §§ 136-137. After the enactment of the 1972 amendments, however, the EPA requested that Congress eliminate the requirement that it review the efficacy[6] of a product during the labeling regulation because the approval process was overly cumbersome. H.R. REP. No. 95-343 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1974 (statement of EPA Administrator Douglas M. Costle). In describing the EPA's burden, the House Agriculture Committee stated, "The registration and reregistration process, which is the foundation of the program, has come to a virtual halt." H.R. REP. No. 95-663 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1991.

Congress reacted to the EPA's concerns by amending FIFRA to permit the EPA to waive the inquiry into product efficacy and limit its review only to the propriety of the label:

> **Approval of registration**
>
> In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition in such as to warrant proposed claims of efficacy.

7 U.S.C. § 136a(c)(5). Since the enactment of section 136a(c)(5), the EPA has waived efficacy inquiries and limited its review to the propriety of the product label. As such, because FIFRA contains no private cause of action, state law tort suits are the only legal vehicle serving to regulate the efficacy of pesticides.

---

6. The term "efficacy" has been given an assortment of meanings by various courts. As defined by the EPA, "efficacy" has two components: product performance (whether the product controls the target pest) and phytotoxicity (whether the product harms the target crop). Brief of Amicus Curiae the United States, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 846 (Cal. 2000) (No. 98-127).

Along with the provisions governing the labeling procedures, FIFRA also contains a preemption clause, limiting the rights of state courts in the area of pesticide labeling regulation. *See* 7 U.S.C. § 136v(a)-(b). These provisions are at the center of this controversy among federal courts, state courts, and the EPA. Specifically, courts have split over whether Congress intended to encompass state law tort claims within the scope of FIFRA's preemption clause.

As this Court has instructed, the "task of statutory construction must focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). This Court has also emphasized that where the regulation contains express preemptive provisions, it is improper to infer a Congressional intent to preempt state law tort claims. *Cipollone*, 505 U.S. 504. Subsection (a) of FIFRA provides that a "State may regulate the sale or use of any federally registered pesticide . . . but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a). In addition, subsection (b) provides:

> **Uniformity**
>
> Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

Id. § 136v(b). Since the enactment of FIFRA, the judiciary has speculated as to Congress's intent regarding the preemption of state tort claims.

B. Legislative History

Because there is no clear expression as to whether Congress intended to preempt state law tort claims by enacting FIFRA, courts often turn to FIFRA's legislative history as a guide to interpreting the provision. In 1991, this Court reviewed the legislative history of FIFRA. *Mortier*, 501 U.S. at 609-10. Before

drafting the 1972 amendment, Congress held twenty-five days of hearings and issued several committee reports. Significantly, throughout the hearings and committee reports, there is no mention of FIFRA serving to preempt state law tort claims. Because Congress was aware that consumers regularly brought state tort claims against pesticide manufacturers, it is absurd to infer that Congress intended to extinguish these ongoing causes of action without express mention in either the statutory language or the legislative history. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (stating the court should presume that Congress is aware of the current legal landscape when it acts); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (noting the unlikelihood that Congress would ban plaintiffs' claims without comment).

Similarly, debate surrounding the amendment's enactment indicates that Congress intended to "not affect tort liability." During the hearings, General Counsel for the EPA emphasized that states play a "major and continuing role in pesticide regulation" and that the EPA:

> wish[es] to encourage and not supplant these efforts by providing that States may prohibit the use of a particular pesticide within their jurisdiction even if the pesticide is registered under the Federal authority. States thus are not precluded from imposing stricter standards or added requirements, but they may not permit any sale or use of a pesticide which is prohibited under the authority of the Act.

Federal Pesticide Control Act of 1971: Hearings Before the House Comm. on Agric., 92nd Cong. 8 (1971). The EPA went on to state in the hearing, without objection, that FIFRA "does not affect tort liability." *Id.* at 42; *see also Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on Agric. Research of the Sen. Comm. on Agric. and Forestry*, 92nd Cong. (1972); *Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on the Envt. of the House Comm. on Commerce*, 92nd Cong. (1972); *Federal*

Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on Agric. Research of the Sen. Comm. on Agric. and Forestry, 92nd Cong. (1971).

As noted by this Court, the Committee Reports underlying FIFRA's preemption clause are contradictory at best. *Mortier*, 501 U.S. at 609-10. On the one hand, the Senate Commerce Committee drafted a report in which an entire section was entitled, "Authority of States" indicating that the intent of the bill was "to leave to the States and local governments the authority to impose stricter regulations on pesticides [sic] use than that [sic] required under the Act." S. REP. No. 92-970, at 44 (1972), *reprinted in* 1972 U.S.S.C.A.N. 3993, 4092. The report also contained a section entitled, "Authority of Local Governments to Regulate the Use of Pesticides." *Id.* at 27. This section noted local governments should be given the authority to regulate the sale or use of a pesticide beyond the requirements imposed by state and federal authorities under the pending legislative scheme. *See id.*

On the other hand, the report of the Senate Committee on Agriculture and Forestry noted that local governments should not regulate pesticides in any manner. S. REP. No. 92-838, at 16 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3993. However, the report also stated that enforcement of FIFRA would be enhanced by "authorizing cooperation with States." *Id.* This Court, in reviewing FIFRA's legislative history concluded that these two committees, which were primarily responsible for the language in FIFRA, never resolved their differences regarding the scope of FIFRA's preemption. *Mortier*, 501 U.S. at 609-10; *see also* H.R. CONF. REP. No. 92-1540, *reprinted in* 1972 U.S.C.C.A.N. 3993, 4130; S. REP. No. 92-838 (Supplemental Report) (1972); S. REP. No. 92-970 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4092; H.R. REP. No. 92-511 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3993.

C. Administrative Commentary

The EPA, the agency with regulatory power under FIFRA, has been outspoken as to Congress's intent regarding the scope of the preemption clause. As previously noted, the EPA issued a report in 1996 stating that courts were misinterpreting FIFRA's preemption clause. PESTICIDE REGULATION NOTICE 96-4. Most significantly, the EPA emphasized that it does not evaluate a pesticide's efficacy prior to approval. With Congress's consent, the EPA has waived inquiries into efficacy, partially because it believed that state tort law would ensure the accuracy of statements regarding a product's efficacy. That report stated,

> This notice explains EPA procedures in approving pesticide labels. . . . EPA is issuing this notice at this time to correct a misunderstanding regarding the FIFRA label approval process and efficacy claims that is reflected in a series of court decisions concerning the preemptive effect of FIFRA. . . . EPA has acted under this authority to waive, by regulation, data requirements as to efficacy issues for all agricultural pesticides [sic]. . . . [A]griculture [sic] pesticides are "effectively regulated by the marketplace," and . . . waiving review of the efficacy of agricultural pesticides in the registration process would enable the Agency to focus of [sic] its "primary mandate under FIFRA" investigating "the health and safety aspects of pesticides."

Id. The EPA went on to quote 47 Fed. Reg. 40,659, 40,661 (Sept. 15, 1982), stating that private tort-based actions ensure that pesticide manufacturers sell efficacious products and that "pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use." *Id.*

When its words went unheeded, the EPA filed an amicus brief in 2000 in a California Supreme Court case. *Etcheverry*, 993 P.2d 366. In its brief, the EPA raised the same sentiments expressed in its 1996 report and argued for a narrow

interpretation of FIFRA's preemption clause. Brief of Amicus Curiae the United States, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 846 (Cal. 2000) (No. 98-127). The EPA highlighted the original purpose of FIFRA, to protect humans and the environment and effectuate uniformity in labeling. *Id.* at 33-35. The EPA, in reviewing FIFRA's plain language and legislative intent, emphasized the lack of express language encompassing state tort claims within the preemption clause. *Id.* at 14, 19-32. Each of the seventy-five times the word "requirement" is used in FIFRA, the term refers only to positive law enactments, not tort remedies. *Id.* at 14. Because "identical words used in differing sections of a statute are presumed to have the same meaning," the EPA argued that Congress must have intended to preempt only positive law enactments and not state tort claims. *Id.* (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)); *see also Sprietsma v. Mercury Marine*, 123 S. Ct. 518 (2002).

Moreover, the EPA emphasized that FIFRA creates no private cause of action, which means that if the preemption clause encompasses tort claims, there is no remedy for those injured by a pesticide. *Id.* at 6. Thus, the EPA contended, it is unlikely that Congress intended to eviscerate pesticide-related tort claims without mention in either the text of FIFRA or its legislative history. *Id.* at 14-16. Once again, as in its 1996 report, the EPA explained that it does not evaluate a product's efficacy; it relies on state law tort claims to govern manufacturers in that area. *Id.* at 44, 19-32.

III. *This Court Should Grant Review to Reconcile the "Jurisprudential Mare's Nest" Regarding Whether FIFRA Preempts State Law Tort Claims.*

Since FIFRA's enactment in 1972, federal and state courts have manifested their confusion regarding the scope of FIFRA's preemption clause by developing a maze of contradictory case law. As federal and state courts struggled over which, if any, state law tort claims were preempted by FIFRA, this Court handed down two opinions addressing the scope of preemption clauses in other federal statutes. *See Medtronic*, 518 U.S. 470;

Cipollone, 505 U.S. 504. Despite the *Medtronic* and *Cipollone* holdings, lower courts have been unable to interpret FIFRA's preemption clause uniformly; rather, the birth of *Medtronic* and *Cipollone* only added another layer of confusion, leading to a variety of cases where courts attempted to either analogize or distinguish this Court's holdings. These varying opinions can best be organized in a chronological manner.

A. Pre-*Cipollone* FIFRA Case Law

Before this Court handed down a modern opinion about federal preemption of state law tort claims, a few courts addressed the breadth of FIFRA's preemption clause. *See, e.g., Ferebee*, 736 F.2d 1529; *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Wilson v. Chevron Chem. Co.*, 1986 WL 14925 (S.D.N.Y. Dec. 17, 1986). First, in *Ferebee*, the Circuit Court for the District of Columbia held that FIFRA did not preempt the plaintiff's failure to warn claim against the manufacturer of a herbicide registered under FIFRA. *Ferebee*, 736 F.2d at 1530. Next, in *Wilson*, the plaintiff sought punitive damages on a failure to warn claim after her husband died from exposure to a herbicide manufactured by Chevron. *Wilson*, 1986 WL 14925 at *2. The Southern District Court of New York held that FIFRA did not preempt state law tort claims. *Id.* at *4. Thus, at least in the beginning there seemed to be some agreement that FIFRA did not preempt state law tort claims. This uniformity, however, would be greatly impacted by this Court's opinion in *Cipollone*.

B. *Cipollone v. Liggett Group, Inc.*

In 1992, this Court addressed a preemption clause in federal tobacco regulation. *Cipollone*, 505 U.S. at 515. In *Cipollone*, a smoker sued Liggett Group after becoming ill from smoking cigarettes. *Id.* at 509. Liggett argued the claim was preempted by federal tobacco regulations found in the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969. *Id.* at 510. In reviewing the 1965 Act,[7]

7. "No statement relating to smoking and health, other than the statement required by . . . this Act, shall be required on any cigarette package." 15 U.S.C. § 1334(a).

this Court held that because Congress passed the Act mainly to create labeling uniformity and only intended to supersede positive enactments of state and local governments, Congress did not intend to preempt state law tort claims. *Id.* at 519. However, in reviewing the 1969 Act,[8] this Court held that the broader language indicated a congressional intent to ban all state requirements regarding advertising or promotion of cigarettes, including state common law claims if they could be said to impose such requirements. *Id.* at 523-24.

C. Post-*Cipollone* FIFRA Case Law

Many federal courts saw *Cipollone* as the answer to the confusion over FIFRA and interpreted FIFRA to be analogous to the cigarette regulations in *Cipollone.* The First Circuit interpreted FIFRA broadly and held that the plaintiffs' state law claims of negligence and strict liability were preempted because they imposed an additional "requirement" prohibited by section 136v(b). *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1346, 1347 (1st Cir. 1993); *see also Grenier*, 96 F.3d 559 (1st Cir. 1996) (holding that claim based on inadequate labeling of log preservative used in home was preempted by FIFRA). The Seventh Circuit also relied on *Cipollone* to hold that section 136v(b) preempted state law tort claims. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993) (preempting plaintiff's claims of strict liability and negligence).

After this Court remanded a Tenth Circuit opinion in light of *Cipollone*, the Tenth Circuit, joined the First and Seventh Circuits in preempting state law tort claims.[9] On remand, the Tenth Circuit likened section 136v(b) to *Cipollone*'s 1969 Act and held that "[t]o the extent the state tort claims in this case

8. "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." 15 U.S.C. § 1334(b).

9. *Ark.-Platte*, 981 F.2d at 1178. In its pre-*Cipollone* opinion, the Tenth Circuit held that failure to warn claims were impliedly preempted under FIFRA. *Id.*

require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Ark.-Platte*, 981 F.2d at 1179. In a pre-*Cipollone* opinion, the Eleventh Circuit held the plaintiffs' claims were "impliedly preempted" after characterizing the claims of negligence, strict liability, and breach of implied warranty of merchantability claims as "inadequate labeling" claims. *Papas v. Upjohn Co.*, 926 F.2d 1019, 1026 (11th Cir. 1991), *vacated by* 505 U.S. 1215 (1992) ("*Papas I*"). This Court remanded that case in light of *Cipollone* and the Eleventh Circuit changed its holding to reflect that label-related claims were expressly preempted by FIFRA. *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir. 1993) ("*Papas II*").

The Eighth and Ninth Circuits also visited FIFRA's preemption clause after *Cipollone*, with both courts holding that tort claims are preempted by FIFRA. *See, e.g., Welchert v. Am. Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995) (preempting express warranty claims if based on statements required on product label); *Taylor*, 54 F.3d 555 (holding that negligent testing, breach of warranty and strict liability claims were all preempted under FIFRA); *Bice v. Leslie's Pool Mart, Inc.*, 39 F.3d 887 (8th Cir. 1994) (preempting failure to warn claims). Further, several district courts held that FIFRA preempts some, if not all, state law tort actions related to labeling. *See, e.g., Wright v. Dow Chem. U.S.A.*, 845 F. Supp. 503 (M.D. Tenn. 1993) (preempting all tort claims except defective design and failure to properly test product); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989) (finding failure to warn claims preempted). Throughout this time, however, some district courts refused to find that *Cipollone* required courts to interpret section 136v(b) as broadly. *See, e.g., Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1134-40 (E.D.N.Y. 1992) (likening FIFRA to the 1965 Act discussed in *Cipollone* and holding that FIFRA does not preempt state law tort claims).

D. *Medtronic, Inc. v. Lohr*

In 1996, this Court again visited the issue of federal preemption of state law tort claims. *Medtronic*, 518 U.S. 470. In *Medtronic*, this Court addressed the Medical Device Amendments of 1976 and whether they served to preempt a plaintiff, whose pacemaker malfunctioned, from bringing negligence and strict liability claims against the manufacturer. *Id.* at 481-84. A four-justice plurality held that Congress did not intend to encompass state law tort claims within the Act's preemption clause. *Id.* at 487-91. In distinguishing *Cipollone*, the Court held that Congress only intended to preempt those claims that conflicted with specific regulations issued by the authorized agency, the Food and Drug Administration. *Id.* at 500-01. Because the FDA had not acted in the area regarding the plaintiff's claims, the claims were not preempted. *Id.* at 501.

Thus, this Court's *Medtronic* reasoning implies that where the federal government has not issued regulations specific to the product or claim at issue, state tort claims in the unregulated area will not be preempted. *Id.* at 500. As in *Medtronic*, the use of the term "requirement" in FIFRA is not dispositive as to congressional intent to preempt state tort claims in an area of the law. *Id.* at 487. Rather, where a federal law bans additional requirements by states, the full import of such a ban must be interpreted in the relevant statutory provisions. *Id.* at 484-86.

E. Post-*Medtronic* FIFRA Case Law

Since *Medtronic*, many of the circuit courts that relied upon *Cipollone* have failed to revisit the issue of the breadth of FIFRA's preemption clause. *See, e.g., Bates*, 332 F.3d 323 (relying solely on *Cipollone*); *Lowe's Home Centers, Inc. v. Olin Corp.*, 313 F.3d 1307 (11th Cir. 2002) (same); *Nat'l Bank of Commerce, of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602 (9th Cir. 1999) (citing one post-*Medtronic* case but using it for an unrelated point). However, some federal courts, along with state courts, have adjusted their holdings in light of *Medtronic* and the EPA's strenuous arguments in favor of a narrow

interpretation of the preemption clause. *See, e.g., Sleath*, 16 P.3d 1042 (adopting EPA's viewpoint that FIFRA not intended to preempt state law tort claims); *Sun Valley Packing v. Consep, Inc.*, 114 Cal. Rptr. 2d 237 (Cal. Ct. App. 2001) (relying on post-*Medtronic* case law to hold various state law tort claims unaffected by FIFRA). These cases focus on what, if any, state law tort claims are preempted and distinguish between claims based on a variety of tests and analyses. In 1999, the Third Circuit held that claims based on negligent failure to package in a manner designed to protect against decomposition of the product are not preempted by FIFRA. *Hawkins*, 184 F.3d at 255. Further, federal district courts have begun carving out exceptions to the previous holdings of their circuit courts requiring preemption of state law tort claims by FIFRA. *See, e.g., Johnson v. Monsanto Chem. Co.*, 129 F. Supp. 2d 189 (N.D.N.Y. 2001); *Jack v. Orkin Exterminating Co.*, No. 97-CV-7012 (JG), 2001 WL 25641 (E.D.N.Y. Jan. 5, 2001).

Some of the federal district courts that are bound by broad-sweeping pre-*Medtronic* precedent, hesitantly continue to find that state law tort claims are preempted by FIFRA. For instance, a California district court, bound by the Ninth Circuit's opinion in *Taylor*, preempted the plaintiff's state law tort claims. *Nathan Kimmel, Inc. v. DowElanco*, 64 F. Supp. 2d 939, 944-45 (C.D. Cal. 1999), *aff'd*, 275 F.3d 1199 (9th Cir. 2002) (affirming in relevant part and preempting all of plaintiff's claims). That court reached its holding only after openly criticizing *Taylor* and urging the Ninth Circuit to reconsider its analysis in light of *Medtronic* and the EPA's position. *Id.*

Several state courts addressing the issue have recognized that FIFRA more closely resembles the statute in *Medtronic* and, thus, does not completely preempt state law tort claims. *See, e.g., Sleath*, 16 P.3d 1042. However, state courts mirror federal courts in their struggle to interpret the breadth of FIFRA's preemption clause. *See, e.g., McAlpine v. Rhone-Poulenc Ag. Co.*; 16 P.3d 1054 (Mont. 2000) ("*McAlpine II*") (reversing the court's three year-old decision in *McAlpine v. Rhone-Poulenc*

Ag. Co., 947 P.2d 474 (Mont. 1997) ("*McAlpine I*")). For example, the Texas Supreme Court has vacillated on the issue throughout this Court's development of preemption jurisprudence. In 1995, that court held that FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides when the claim relates directly or indirectly to labeling. *Quest Chem. Corp. v. Elam*, 898 S.W.2d 818, 820 (Tex. 1995).

After *Medtronic*, the Texas court reconsidered it position. *Geye*, 79 S.W.3d 21. In addressing the viability of the plaintiffs' crop injury claims based on strict liability, breach of express and implied warranty, and violation of the Texas Deceptive Trade Practices Act, the Supreme Court of Texas held the claims were not preempted by FIFRA. *Id.* at 29. The court, focusing on the EPA's 1996 report, held that FIFRA did not preempt all state law tort claims. The *Geye* court distinguished its previous opinion in *Quest* by stating that *Quest* "involved a claim for personal injury while [*Geye*] involved a claim for target crop damage." *Id.* The Texas court found this distinction important because the EPA has no interest in whether a pesticide is toxic to its target crop. *Id.* However, as one of its primary mandates, the EPA stringently regulates the impact pesticides have on human health. *Id.*

In one case where the EPA filed an amicus brief, the Supreme Court of California held that any claim "however couched, [that] boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Etcheverry*, 993 P.2d at 377; *see also Eyl v. Ciba-Geigy Corp.*, 650 N.W.2d 744 (Neb. 2002), *cert. denied*, 123 S. Ct. 2646 (2003) (holding that bystander state tort claims for personal injury were preempted by FIFRA). *Etcheverry*, however, was not the last word regarding the breadth of FIFRA's preemption clause in California. In 2001, two California intermediate courts held that defective design, breach of express warranty, and negligence claims were not preempted

by FIFRA. *See Arnold v. Dow Chem. Co.*, 110 Cal. Rptr. 2d 722 (Cal. Ct. App. 2001); *Sun Valley*, 114 Cal. Rptr. 2d 237.

In 2000, the Supreme Court of Montana rejected California's stance on FIFRA preemption. *Sleath*, 16 P.3d 1042, *overruling McAlpine I*, 974 P.2d 474. Relying on *Medtronic* and the EPA's *Etcheverry* brief, that court overruled a previous holding and clarified that FIFRA does not preempt common law tort claims. *Id.* Other intermediate state appellate courts have also relied on *Medtronic* to distinguish federal cases and to hold that FIFRA does not preempt state law tort claims. *See, e.g., Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999); *Tyler v. Dow Chem. Co., Inc.*, 683 N.Y.S.2d 619, 620 (N.Y. App. Div. 1998).

IV. *This Court Should Grant Review to Clarify the Proper Analysis in Determining Which, if Any, State Tort Claims Are Preempted by FIFRA.*

As previously argued, federal and state judges are pitted against each other in the battle over the viability of state law tort claims in pesticide-related cases. Significantly, there exists an additional layer of conflict in the FIFRA preemption controversy. Courts that are united in holding that FIFRA preempts tort claims are splintered on the issue of the proper analysis to apply in determining which tort claims are preempted. While some courts apply a broad test, preempting all tort claims raised, others have applied more narrow tests, carving out exceptions and permitting certain claims to survive FIFRA preemption. The variety of tests applied by lower courts can be grouped into five categories: (1) Common Aims Test; (2) Efficacy Test; (3) Risk-Utility Test; (4) Label-Based Test; and (5) Inducement Test. This Court should grant review to clarify the proper analysis for determining which, if any, tort claims survive FIFRA's preemption clause.

A. The Common Aims Test

The Circuit for the District of Columbia, one of the first courts to address the issue, held that state law tort claims were not preempted by FIFRA. *Ferebee*, 736 F.2d at 1540.

The *Ferebee* opinion, which has never been revisited by the court, recognized that FIFRA's regulatory function differed from the compensatory function of state law tort claims. *Id.* Noting that potential liability promotes legitimate regulatory aims, the *Ferebee* court held that tort claims do not conflict with the language of FIFRA's preemption clause. *Id.* at 1543. The court also stated that liability for state law tort damages does not require the manufacturer to alter its label; a verdict merely informs the manufacturer that if it chooses to sell harmful pesticides in that jurisdiction, it may have to compensate for some of the resulting injuries. *Id.* at 1541. Thus, the *Ferebee* court upheld the Maryland plaintiff's claims based on inadequate labeling and established the first of the many analyses used today to determine which, if any, tort claims are preempted by FIFRA. *Id.* at 1543.

This approach is also followed in the state of Montana. *Sleath v. W. Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied*, 534 U.S. 814 (2001). In 2000, the Supreme Court of Montana handed down sister opinions in *Sleath* and *McAlpine II*, reversing the position it took "a scant three years" earlier. *Id.* at 1053 (Gray, J., *dissenting*). *Compare McAlpine II*, 16 P.3d 1054, *with McAlpine I*, 947 P.2d 474. As one basis for its abrupt about face, the Montana court relied on the EPA's anti-preemption position articulated in its amicus brief in *Etcheverry*.

Like the D.C. Circuit, the Montana Supreme Court recognized the difference between a state directly commanding that a pesticide manufacturer alter its label and a damage award that may prompt the manufacturer to make such a change. *Sleath*, 16 P.3d at 1051. Perhaps most importantly, the Montana Supreme Court scrutinized the differences between this Court's opinions in *Medtronic* and *Cipollone* and found that the analysis in *Medtronic*, leading to a finding of no congressional intent to preempt state law tort claims, applied with equal force to FIFRA. *Id.* at 1053. The state courts of Arkansas, Oregon, and New

York, along with other federal courts,[10] have adopted a similar analysis. *Alter*, 834 S.W.2d at 145; *Brown*, 985 P.2d 846; *Mann v. H.W. Anderson Prods., Inc.*, 676 N.Y.S.2d 658 (N.Y. App. Div. 1998).

Until recently, the Solicitor General of the United States supported use of this test in its amicus briefs. Briefs of Amicus Curiae the United States, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 846 (Cal. 2000) (No. 98-127) and *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000) (No. 98-60496). In these briefs, the Solicitor General and the EPA submitted that the "courts that have concluded that FIFRA preempts state-law damages actions have done so . . . without fully examining the text, regulatory background, legislative history, and purposes of FIFRA," factors which illustrate congressional intent for state law tort actions to continue compensating for injuries caused by pesticide use. *Id.* To read FIFRA's preemption section any other way produces an absurd and unintended result — granting complete immunity to an industry Congress deemed in need of more stringent regulation. The Solicitor General and the EPA therefore urged a holding that FIFRA categorically does not preempt state law tort claims. *Id.*

However, the Solicitor General recently departed from this view. *See* Brief of Amicus Curiae the United States on Petition for a Writ of Certiorari, *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003) (No. 02-367). Interestingly, the EPA did not join the Solicitor General in submitting the amicus briefing in *Geye* as it had in *Etcheverry* and *Hart*. Furthermore, the EPA has not retracted PESTICIDE REGULATION NOTICE 96-4. Although it is unclear whether the lack of the EPA's imprimatur on the Solicitor General's *Geye* amicus

10. *See, e.g., Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988) (following the *Ferebee* decision); *Villari v. Terminix Int'l, Inc.*, 692 F. Supp. 568, 578 (E.D. Pa. 1988) (noting "the obvious purpose underlying FIFRA's prohibition of state labeling and packaging requirements... is not undermined by the plaintiffs' failure-to-warn claim"); *Wilson*, 1986 WL 14925 (holding that liability for damages, including punitive damages, is consistent with FIFRA's purpose).

briefing suggests a divergence between the interpretation of the two offices, the fact that the Office of the Solicitor General has changed its approach between 1999 and today illustrates the widespread confusion in this area of law.

B. The Efficacy Test

Courts applying the efficacy test refuse to preempt claims related to the efficacy of a product. According to the EPA, "efficacy" is defined as either product performance (whether the product controls the target pest) or phytotoxicity (whether the product harms the target crop). Brief of Amicus Curiae the United States, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 846 (Cal. 2000) (No. 98-127). In 2002, the Supreme Court of Texas applied the efficacy test to hold that the plaintiff's claims of strict liability, breach of express and implied warranty, and violation of the Texas Deceptive Trade Practices Act were based on the efficacy of the product and, thus, not preempted by FIFRA. *Geye*, 79 S.W.3d at 27-29.

In arriving at its holding, the *Geye* court found it persuasive that the EPA requested to be relieved of its duty to regulate efficacy and Congress permitted the EPA to waive efficacy inquiries. *Id.* At 27. Thus, the EPA's waiver of efficacy regulation prompted the *Geye* court to recognize the viability of pesticide-related claims based on efficacy. *Id.* at 29 (stating "without EPA regulation, there can be no preemption"). Thus, although the common aims test and the efficacy test do allow for some state law tort claims to survive FIFRA's preemption clause, they conflict in their analyses and results. This conflict illustrates the endemic confusion surrounding the importance of the EPA's role in answering FIFRA preemption questions and underscores the need for direction from this Court.

C. The Risk-Utility Test

In an unpublished opinion, the Ninth Circuit departed from its usual FIFRA preemption analysis after receiving the answers to two questions it certified to the Washington Supreme Court. *Ruiz-Guzman v. Amvac Chem. Corp.*, No. 98-35088, 2000 WL 1763212 (9th Cir. Nov. 28, 2000). In that case, the plaintiffs

sued on a defective design theory of strict liability after becoming ill from exposure to a pesticide.[11] Under Washington law, a plaintiff may recover in strict liability under either the "consumer expectation" test or the "risk-utility" test. *Ruiz-Guzman*, 2000 WL 1763212, at *1.

On the one hand, the Ninth Circuit noted that, because FIFRA preempts label-related claims, the court was prevented from applying the consumer expectation test, which inquires into the adequacy of the product's label. *Id.* (citing *Papike v. Tambrands Inc.*, 107 F.3d 737, 743 (9th Cir. 1997) (stating, "To rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a product to perform more safely than its government-mandated warnings indicate")). Because the warnings on the pesticide at issue complied with FIFRA, the plaintiffs were unable to rely on the consumer expectation test to establish the pesticide's defective design. *Id.*

On the other hand, the Ninth Circuit held the risk-utility test, which examines whether the pesticide's utility greatly outweighs the risks posed by its use, did not conflict with the territory regulated by FIFRA. *Id.* As such, the court remanded the plaintiffs' design defect claim for application of the risk-utility test. *Id.* The Ninth Circuit's recognition that the risk-utility test may be the appropriate analysis for certain FIFRA preemption issues adds yet another varying approach to resolving this issue. The risk-utility test incorporates the existence of safer, alternative products into the equation and utilizes a cost-benefit analysis to the arena of pesticide manufacture and retailing. *Id.*; *see also* 7 U.S.C. § 136(bb) & 7 U.S.C. § 136a(d)(1)(C); RESTATEMENT (THIRD) OF TORTS § 2 cmt. f, at 24 (1998). Significant to this Court, the application of the risk-utility test to FIFRA preemption issues adds yet a fifth category of analyses

11. *Id.* at *1. Notably, due to the toxicity of the pesticide at issue and its anticipated use, the manufacturer "worked with the Washington State Department of Agriculture to develop additional restrictions on [the pesticide's] sale and use in Washington orchards." *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 797 (Wash. 2000).

applied by courts across the country that are struggling to resolve the issue of FIFRA preemption. In the two decades of conflicting case law, the need for guidance from this Court has never been more evident.

D. The Label-Based Test

The "label-based test," which asks whether the plaintiff's claim can be related back to the pesticide's label, has been applied to preempt claims that a pesticide did not perform as promised,[12] "off label" warranty claims,[13] and negligence and strict liability claims alike.[14] The gravamen of this test is once "a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied and the adequate warning issue ends." *Papas II*, 985 F.2d at 518; *Etcheverry*, 993 P.2d at 368. Accordingly, under this analysis, all state law tort claims that can be linked to the product's label are preempted. *Ark.-Platte*, 981 F.2d 1177. This test, or some derivative thereof, is applied by most Circuit Courts of Appeal. However, the fact that courts purport to apply the same test does not provide parties with predictable results. *Compare Hawkins*, 184 F.3d at 254 (3d Cir. 1999) (holding no preemption of defective packaging based claims), *with Lowe*, 47 F.3d at 129 (preempting defective packaging-based claims). For this reason, this area of law remains unsettled.

Conversely, should the court hold that the claim is not label-related, the plaintiff's cause of action survives. The exclusion of "off label" warranties from preemption under the label-based test is based on the principle that, "[q]uite simply, claims based on misrepresentations of fact do not challenge the labeling of a manufacturer's product." *Gorton v. Am. Cyanamid Co.*, 533 N.W.2d 746, 755 (Wis. 1995). This rule led the Supreme Court of Wisconsin to hold that misrepresentation claims related to the manufacturer's written promotional materials,

12. *See Andrus*, 178 F.3d 395.

13. *See Kuiper*, 131 F.3d 656.

14. *See Shaw*, 994 F.2d 364.

advertisements, and technical reports were not preempted. *Id.* Further, the plaintiff's claims based on oral statements made by the manufacturer's technical service representatives survived FIFRA preemption. *Id.*

However, the results of applying the label-related test are neither consistent nor predictable. For example, in 1992, the Ninth Circuit held that a state statute requiring point-of-sale warnings is not preempted, but in 1995, the same court found that failure to warn claims based on the inadequacy of point-of-sale signs were preempted. *Compare Chem. Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 946-47 (9th Cir. 1992), *with Taylor*, 54 F.3d at 561. Incorporating a new layer of analysis, the Seventh Circuit held that off-label statements that repeat information contained in the label are preempted, as are claims challenging the advertising or marketing of a pesticide. *Kuiper*, 131 F.3d at 662-63.

The Fifth Circuit has applied the *Kuiper* test, but noted that other courts preempt "any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff" as such a claim "necessarily challenges the adequacy of the warnings provided on the products labeling or packaging." *Andrus*, 178 F.3d at 400. Therefore, even within the courts purporting to apply the label-based test, there is a splintering in the application process. The conflict created by such a variety of approaches undermines the concept of uniformity that Congress sought to effectuate by enacting FIFRA. The need for guidance from this Court is plainly evident.

E. The Inducement Test

Of all five categories, the inducement test is the most broad-sweeping of the tests used to interpret the scope of FIFRA's preemption clause. The inducement test focuses on the subjective inquiry of whether the tort claim would "induce" the manufacturer to change its label. *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994). Unlike the other tests, the inducement test encompasses claims that are objectively label-

related and expands to include those that, although not directly related to the label, may induce the manufacturer to change its label. *Andrus*, 178 F.3d at 398-99. Application of this test results in the preemption of virtually all claims arising from pesticide-related injuries. *Id.*

The Fourth Circuit applied this test to preempt claims for negligent testing, manufacture, marketing, and failure to warn. *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 747-48 (4th Cir. 1993). As evidence that liability on the plaintiffs' claims would induce the manufacturer to alter its product or label, that court emphasized that "about the same time [as the Worms filed their claim] American Cyanamid submitted to the EPA a revised label addressing the risk" complained of by the Worms. *Id.* at 746. This bolstered American Cyanamid's argument that the threat of liability would induce it to alter its label. *Id.*

In the case before this Court, the Fifth Circuit further expanded the inducement test. *Bates*, 332 F.2d 323. The Fifth Circuit ruled that the farmers' breach of warranty, fraud, DTPA, negligence, and strict liability causes of action were preempted. *Id.* at 329. However, to support its holding, the Fifth Circuit expanded upon the test originally applied by that court in *Andrus*, stating that the claims were preempted because they would have "the 'undeniable practical effect' of inducing a manufacturer to alter the **product *or* label** to avoid liability." *Id.* at 329 n.9 (emphasis added) (citing *MacDonald*, 27 F.3d at 1025).

Adoption of this altered version of the inducement test spans beyond the scope of the issues regulated by the EPA. *See* PESTICIDE REGULATION NOTICE 96-4. The EPA governs the propriety of labels, not the efficacy of the product.[15] However, the Fifth Circuit's most recent interpretation of FIFRA's preemption clause, asking whether state law tort liability would

15. As previously mentioned, the EPA defines "efficacy" as either product performance (whether the product controls the target pest) or phytotoxicity (whether the product harms the target crop). *See* Brief of Amicus Curiae the United States, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 846 (Cal. 2000) (No. 98-127).

induce the manufacturer to change the **product *or* label**, will insulate defendants from liability for the manufacture or sale of a defective product regardless of whether the labeling will be affected. *Bates*, 332 F.3d at 329. Further, it places no duty upon manufacturers to correct that defect, whether it be a flawed product or a deficient label. *Id.*

With the EPA refusing to regulate pesticide efficacy and the Fifth Circuit preempting all claims that may induce manufacturers to change their products, no agency or individual is regulating the efficacy of this nation's pesticides. *See, e.g.*, *Andrus*, 178 F.3d at 399. This grossly exaggerated *laissez faire* governance is precisely what Congress sought to avoid in enacting FIFRA and is wholly ineffective at regulating new products. Indeed, the inducement test directly contravenes the underlying motivation prompting Congress to enact FIFRA, protecting the health and environment from unsafe products. Thus, as courts continue to employ this test and insulate manufacturers from all claims, the goal of FIFRA to protect man and the environment will be rendered impotent.

Congressional intent is continually frustrated as courts continue to vary in their approach. In the states of Texas, Arkansas, Montana, Oregon, and New York, a plaintiff's claims against a manufacturer are viable in state court, but are preempted in the corresponding federal court. Thus, the conflict over the scope of the preemption clause and the proper analysis to be applied will encourage consumers and manufacturers to forum shop, seeking a venue friendly to their cause. As courts struggle to interpret FIFRA's preemption clause, there is not now nor will there ever be uniformity in the requirements of pesticide manufacturing.

V. *The Particular Disposition and Facts of This Case Present This Court with the Opportunity to Finally Resolve the Conflict Surrounding FIFRA's Preemption Clause.*

This case is distinguishable from the other FIFRA cases in which this Court has denied review. First, this case, unlike the case of *American Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex.

2002), *cert. denied*, 123 S. Ct. 2637 (2003), contains a final disposition of the matter in controversy. Here, the Fifth Circuit finally disposed of all claims raised by the farmers by affirming the district court's grant of summary judgment giving this Court jurisdiction over the appeal.

Second, as opposed to *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 123 S. Ct. 415 (2002), this case contains claims inextricably intertwined with the two layers of conflicting case law discussed in this Petition. Most significantly, this case raises claims of crop injury, as opposed to the personal injury claim brought in *Netland*, and implicates the EPA's waiver of efficacy oversight. Permitting litigation based on crop injury claims fills the gap left open by the EPA's refusal to regulate the efficacy of pesticide-related products and encourages the production of safer pesticides. Furthermore, where *Netland* raised only one claim, failure to warn, this case includes the vast array of claims that would normally be brought in a crop injury case: breach of warranty, fraud, violations of state consumer protection laws, and strict liability based on defective design. By granting review of this case, this Court can finally resolve all issues related to the differing positions taken by federal and state courts, the EPA, and the Solicitor General regarding the scope of FIFRA's preemption clause.

Third, in this case, the Fifth Circuit ruled on each of the claims presented, holding that all claims were label-related and, therefore, preempted by FIFRA. Upon the invitation of this Court the Solicitor General of the United States filed an amicus brief advocating that this Court should not grant review because, *inter alia*, the lower court did not rule on whether the claims were label-related or imposed a "requirement" as defined by FIFRA. *See* Brief of Amicus Curiae the United States on Petition for a Writ of Certiorari, *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003) (No. 02-367). In the case before this Court, however, the Fifth Circuit characterized each of the claims as label-related and as

"inducing" the manufacturer to change its label or product. Thus, the questions left unanswered in *Geye* have been answered in this case.

Fourth, this case is distinguishable from all other FIFRA-related cases brought to this Court because it highlights the harm caused by the lack of uniformity in the area of FIFRA preemption. In this case, Petitioners complied with state law, giving Dow sixty days notice of their claims before filing suit. During that time, Dow used the Declaratory Judgment Act ("DJA"), codified at 28 U.S.C. § 2201, to "strike first" and secure a venue favorable to its defenses. Dow, by using the DJA expressly for purposes of forum shopping, has compounded the harm resulting from the lack of uniformity in the area of FIFRA preemption. Because conflicts of this kind give rise to a serious risk of forum shopping, they are especially deserving of this Court's attention. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

Both consumers and manufacturers are encouraged to forum shop based on the differing precedent of state and federal courts. For example, consumers in Texas will seek venue in state court to ensure the viability of their claims. *Geye*, 79 S.W.3d at 24. Manufacturers will seek venue in federal court, which preempts virtually all pesticide-related claims. *Bates*, 332 F.3d at 327. Absent clarification by this Court, venue will remain the dispositive factor in pesticide-related cases, encouraging all parties to forum shop.

Moreover, should consumers choose to raise a claim under a statute containing a notice provision, like the Texas DTPA, they will be required to give notice to the manufacturer prior to filing suit. It is safe to assume that Dow, along with other manufacturers, will continue to use this grace period to "strike first" and secure a venue in federal court through the offensive use of the DJA. Thus, the conflict between federal and state courts, along with the differing arguments raised by the EPA and the Solicitor General, serve as the primary motivation for

forum shopping. The requirement of notice under the laws of several states and existence of the DJA compound this problem. This Court should grant review to remove the issue of venue from the forefront of FIFRA cases, prevent forum shopping, and focus litigants' attention on the proper issue, the merits of their case.

CONCLUSION

This case raises important questions of state and federal law and the interaction between the two. The Fifth Circuit's preemption of the state law tort claims raised in this case conflicts with a 2002 decision of the Supreme Court of Texas that permits the same crop injury claims to survive. Conflicts like this exist between several other state courts of last resort and the pertinent Circuit Courts of Appeal, creating incongruent results based on geographical and jurisdictional happenstance. This case presents an important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

PHIL WATKINS
BETH W. SQUIRES
PHIL WATKINS, P.C.
700 North St. Mary's Street
Suite 1750
San Antonio, Texas 78205
(210) 225-6666

KIMBERLY S. KELLER
Counsel of Record
THE KELLER GROUP
14302 Ben Brush Lane
San Antonio, Texas 78248
(210) 857-5267

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 11, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-10908

DOW AGROSCIENCES LLC,

Plaintiff-Appellee

versus

DENNIS BATES; JIMMY BURSON; BENNY JUDAH, doing business as Clearwater Farms; TOMMY COLEMAN; RICHARD COX; ET AL.,

Defendants-Appellants

Appeal from the United States District Court
For the Northern District of Texas.

Before GARWOOD and HIGGINBOTHAM, Circuit Judges, and FELDMAN,* District Judge.

FELDMAN, District Judge:

Dow Agrosciences LLC sought a declaratory judgment against 29 Texas peanut farmers whom were threatening to

---

* District Judge of the Eastern District of Louisiana, sitting by designation.

sue Dow for damages caused by a Dow-manufactured herbicide. Dow sought, among other things, a judicial declaration that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (West 2002), preempts the farmers' state law claims. The district court denied the farmers' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and granted Dow's motion for summary judgment, holding that FIFRA preempts the farmers' state law claims. We affirm.

I.

Strongarm is a herbicide produced and marketed by Dow to control the growth of weeds in peanuts. Strongarm is registered with the United States Environmental Protection Agency as required by FIFRA.

In the spring of 2000, many peanut farmers from west and northwest Texas bought Strongarm from local retailers. Many of these farmers contend that Strongarm stunted the growth of peanut plants, caused yellowing, inhibited peanuts from lapping or properly developing foliage, delayed maturity, reduced total peanut production, and increased the expense of harvesting future peanut crops.

The farmers sent Dow demand letters, claiming that Dow retailers had misrepresented Strongarm.[1] The letters

1. The farmers contend that the retailers failed to disclose that Strongarm damages peanut crops planted in soil with a pH level above 7.0.

threatened to sue Dow for false advertising, breach of warranty, and fraudulent trade practices under the Texas Deceptive Trade Practices Act (DTPA). *See* Tex. Bus. & Com. Code Ann. § 17.505(a) (Vernon 2002).

Dow struck first, and sued for declaratory judgment against 29 of the farmers. Dow sought a declaration that: (1) FIFRA preempts the farmers' state law claims; (2) the "Limitation of Remedies" paragraph on the Strongarm label limited the farmers' remedies to the purchase price of the product; and (3) the "Warranty Disclaimer" paragraph on the label barred any other claims based on a warranty of representation. The farmers counterclaimed against Dow for negligence, breach of implied and express warranties, fraud, fraud in the inducement, defective design, estoppel, and waiver.

II.

A. Subject Matter Jurisdiction

The farmers first contend that federal diversity jurisdiction did not exist over Dow's lawsuit because three of the farmers' claims failed to meet the $75,000 amount-in-controversy requirement. 28 U.S.C. § 1332(a) (West 2002). The issue of subject matter jurisdiction is subject to plenary review by this Court. *See Julian v. City of Houston*, 314 F.3d 721, 725 (5th Cir. 2002). As the party invoking diversity jurisdiction, Dow bears the burden of establishing the amount in controversy. *See Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir. 2002).

When the claim is one for declaratory relief, the amount in controversy is determined by "the value of the right to be protected or the extent of the injury to be prevented." *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1252-53 (5th Cir. 1998). The amount claimed by the plaintiff controls "if the claim is apparently made in good faith." *Id.* at 1253 (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938)).

Dow's complaint for declaratory relief states that the value of each of the individual claims exceeds $75,000. But that bare allegation, by itself, does not invest a federal court with jurisdiction. *See Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566 (5th Cir. 1993). We must therefore ascertain, based on "summary judgment type evidence," whether the amount in controversy requirement has been met. *St. Paul Reinsurance*, 134 F.3d at 1253.

The farmers point to the claims of Burk Denman, Richard Cox, and Frenchie Lee Wheeler. Their demand letters claim the following damages: Denman, $37,992.50; Cox, $33,227.50; and Wheeler, $18,242.50. All three, moreover, sought an additional $10,000 in attorney's fees. *See Hartford Ins.*, 293 F.3d at 912 (including "attorneys' fees, penalties, statutory damages and punitive damages" in the amount-in-controversy calculation).

The farmers' original damage requests, on their face, do not satisfy the $75,000 requirement; the farmers' actual claims, however, are substantially greater because the DTPA

permits a plaintiff to recover the costs of litigation, pre and post-judgment interest, and treble damages.[2] *See* Tex. Bus. & Com. Code Ann. § 17.50(b)(1) (Vernon 2002) (providing for an "award not more than three times the amount of damages for mental anguish and economic damages").

The three farmers' original demand letters did not include claims for punitive damages. Not only were such damages available to them under the DTPA, but they later sought such damages in their counterclaims. We agree with the district court that "additional demands for attorneys' fees and punitive damages exalts the total amount in controversy over $75,000."[3] Thus, federal diversity jurisdiction existed over Dow's lawsuit.

B. Abstention

Appellants next urge that the district court should have abstained from taking jurisdiction over Dow's lawsuit.

---

2. The DTPA, however, does not permit the value of attorneys' fees, costs, and prejudgment interest to be included in the treble damages calculation. *See* Tex. Bus. & Com. Code Ann. § 17.50(e) (Vernon 2002).

3. The mere availability of treble damages establishes that Denman's and Cox's claims satisfy the $75,000 requirement. After trebling Wheeler's request of $18,242.50, and adding his claim for attorneys' fees, Wheeler's potential recovery is only $64,727.50. After an independent review of the record, this panel agrees with the district court that Wheeler's stated claim of $18,242.50 did not include his claim for future damages. After future damages are added to the amount of his original claim, Wheeler's total claim meets the $75,000 requirement for federal diversity jurisdiction.

District courts have a broad, but not unfettered, measure of discretion in deciding whether to entertain an action for a declaratory judgment. *See Travelers Ins. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778 (5th Cir. 1993); *Torch, Inc. v. LeBlanc*, 947 F.2d 193, 194 (5th Cir. 1991). Thus, a grant of declaratory relief is reviewed for abuse of discretion. *See Magnolia Marine Transport v. Laplace Towing Corp.*, 964 F.2d 1571, 1581 (5th Cir. 1992).

While acknowledging the district court's broad discretion to exercise jurisdiction over declaratory judgment suits, this Circuit requires courts to consider various factors, on the record, before abstaining from a declaratory judgment action:

> 1) whether there is a pending state action in which all the matters in controversy may be fully litigated, 2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant, 3) whether the plaintiff engaged in forum shopping in bringing the suit, 4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist, 5) whether the federal court is a convenient forum for the parties and witnesses, . . . 6) whether retaining the lawsuit in federal court would serve the purposes of judicial economy, . . . [and] 7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom parallel state suit between the same parties is pending.

St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 590-91 (5th Cir. 1994).

The district court correctly considered the *Trejo* factors on the record before opting to entertain Dow's declaratory action. Appellants, however, assert that the *Trejo* analysis favors abstention because Dow's lawsuit fails to implicate the core purposes of the Declaratory Judgment Act. They mistakenly rely primarily on our decision in *Magnolia Marine*. 964 F.2d 1571.

In *Magnolia Marine*, which preceded *Trejo*, our Court reversed the district court's decision to accept a declaratory judgment action. *Id.* at 1581. We mandated abstention because the declaratory suit was filed immediately after the defendant conveyed her intent to sue the plaintiffs in state court, and, we said, the plaintiffs initiated the lawsuit "solely to obtain their preferred forum in which to anticipate a defense that they could adequately raise" in state court. *Id.* at 1581-82.

Dow's first strike seems somewhat similar to the conduct in *Magnolia Marine*. Dow, too, filed for declaratory relief in anticipation of being sued in state court. Dow engaged in at least some degree of forum shopping.[4]

---

4. Although Dow chose to lay venue in Lubbock, a place convenient for the farmers, the choice of a federal court was no doubt a strategic one. *See American Cyanamid Co. v. Geye*, 79 S.W.3d 21, 23 (Tex. 2002).

Against the measure of *Magnolia Marine*, the first three *Trejo* factors appear to favor abstention.[5] We nonetheless agree with the district court that the last three factors clearly instruct against abstention: the resolution of this dispute in a single federal forum furthers the interests of judicial economy;[6] the federal forum does not appear to be inconvenient to the farmers; and the federal court was not asked to construe a state judicial decree involving the same parties as those involved in a parallel, pending state suit.[7] *See Trejo*, 39 F.3d at 590-91.

---

5. We assume, *arguendo*, that the first *Trejo* factor supports abstention despite the fact that the federal suit was filed first. Pursuant to the statutory notice requirements of the DTPA, the farmers were precluded from bringing a state court action at any time within sixty days from the date the demand letters were mailed, and Dow brought its declaratory judgment action after the farmers had taken the requisite first steps toward bringing a DTPA action.

6. In *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), the Seventh Circuit disregarded the fact that federal court abstention would force the defendant to defend lawsuits in various jurisdictions against a variety of plaintiffs. *Id.* at 1168-69. The *Cunningham* panel, however, emphasized repeatedly that the underlying action was one of personal injury. Because the scope of *Cunningham* appears limited to personal injury actions, and is not a ruling of this Circuit, we find it to be of little persuasion. We find that resolving the farmers' claims in a single federal forum clearly furthers the interests of judicial economy.

7. It is unclear from the record whether the fourth factor, concerned with inequities gained by a plaintiff's precedence in time, supports abstention.

Thus, "[i]n light of the breadth of the district court's discretion," *Torch*, 947 F.2d at 195, and because the weight of the *Trejo* factors appears to be balanced and to have been properly considered by the district court on the record, we find that the court did not abuse its discretion by entertaining Dow's suit for declaratory judgment.

C. FIFRA Preemption

Appellants also contend that the district court erred when it decided, by way of summary judgment, that FIFRA preempted their state law claims. Our review of a district court's grant of summary judgment is *de novo*. *See Young v. Equifax Credit Information Services, Inc.*, 294 F.3d 631, 635 (5th Cir. 2002).

Preemption analysis proceeds from "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). Preemption may nonetheless occur in one of three ways: it may be expressed by the federal statute, it may be implied from the terms or structure of a federal statute, or it may arise in a situation where a conflict between state and federal regulations makes compliance with both a physical impossibility. *See id.* The district court found that FIFRA expressly preempted the farmers' state law claims. We agree.

FIFRA is a comprehensive regulatory scheme aimed at controlling the use, sale, and labeling of pesticides. *See id.* at 601. FIFRA requires, among other things, that manu-

facturers submit proposed product labels for EPA approval. *See* 7 U.S.C. § 136a(c)(1)(C) (West 2002).

Section 136v of FIFRA announces:

> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

The Court has addressed the scope of § 136v(b) many times. *See Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000); *Andrus v. Agrevo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *MacDonald v. Monsanto*, 27 F.3d 1021 (5th Cir. 1994). Our decisions reveal three clear principles. First, FIFRA does not completely preempt all state or local regulation of pesticides. *See Hart*, 199 F.3d at 244 (rejecting an attempt to premise federal question jurisdiction on a claim of complete preemption). Second, FIFRA does not preempt common law that is unconcerned with herbicide labeling, nor does it preempt those state laws concerned with herbicide labeling that do not impose any requirement in addition to or different

from the FIFRA requirements.[8] *See Andrus*, 178 F.3d at 398; *see also Hart*, 199 F.3d at 245 ("FIFRA preemption does not extend to non-labeling state common-law causes of action."). Finally, FIFRA preempts state laws that either directly or indirectly impose different labeling requirements.[9] *See MacDonald*, 27 F.3d at 1025.

The district court found that each of the farmers' state claims were preempted under § 136v(b) because they constituted "requirements for labeling and packaging in addition to those required under" FIFRA.[10] Appellants advance two arguments against preemption. First, they contend that state labeling requirements related to product effectiveness are not within the scope of FIFRA's express preemption clause. Second, they assert that their claims are not sufficiently related to the content of the Strongarm label. We reject each argument.

---

8. It is well-established that the term "any requirements" encompasses both positive state enactments as well as common-law causes of action. *See Andrus v. Agrevo USA Co.*, 178 F.3d 395, 398 (5th Cir. 1999).

9. For example, different requirements may be imposed when a court authorizes a damage award against a manufacturer that has the "undeniable practical effect" of inducing a manufacturer to alter the product or label to avoid liability. *See MacDonald v. Monsanto*, 27 F.3d 1021, 1025 (5th Cir. 1994). It is this mandate that is fatal to appellants' argument.

10. Thus, we first review whether the farmers' claims are expressly preempted by § 136v(b); if FIFRA does not expressly preempt the farmers' claims, it becomes necessary to analyze whether such claims conflict with federal law.

1) State Labeling Requirements Related to Product Effectiveness are Within Scope of FIFRA's Express Preemption Clause

Appellants urge that their product effectiveness claims, even those which impose a labeling requirement, are not within the scope of FIFRA's express preemption clause. Their argument suggests that FIFRA preemption of performance-related claims requires the existence of conflicting EPA enactments.

In *Cipollone v. Liggett Group, Inc.*, the Supreme Court held that, as long as a federal statute[11] contains an express preemption clause, it is wholly unnecessary and inappropriate to import notions of implied preemption through conflict into the express preemption analysis.[12] 505 U.S. 504, 517, 531-

11. *Cipollone* reviewed the express preemption clause in the Public Health Cigarette Smoking Act of 1969. The Smoking Act of 1969 and FIFRA are strikingly similar. The Tenth Circuit has written, "Although the words employed in § 136v(b) are different from those in § 5(b) of the Cigarette Smoking Act, their effect is the same . . . [and w]e see no difference between the operative effect of the two acts." *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177, 1179 (10th Cir. 1993). Moreover, the Seventh Circuit also "discern[ed] no significant distinction at all" between the two clauses. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993) ("Not even the most dedicated hair splitter could distinguish these statements.").

12. "Where, as here, Congress has included in legislation a specific provision addressing . . . pre-emption, the Court's task is one of statutory interpretation—only to identify the domain expressly

(Cont'd)

32, 544, (1992)(plurality opinion). Nowhere in FIFRA's text is § 136v(b)'s express preemptive command, or § 136v(a)'s savings clause, linked to the interplay of EPA regulations. 7 U.S.C. § 136 (West 2002); *see also Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir. 1993)("We believe Congress circumscribed the area of labeling and packaging and preserved it only for federal law . . . [w]ith the same stroke, Congress banned *any* form of state regulation, and the interdiction law is clear and irrefutable.") (emphasis added).

Although FIFRA's text does not define the scope of FIFRA's preemption clause to be a function of existing EPA regulations, appellants nonetheless insist that an implied conflict preemption analysis must be imported into § 136v(b). To support their claim, they rely primarily on the Texas Supreme Court's decision in *American Cyanamid Co. v. Geye*, which held that the EPA's decision to not regulate product labeling "with respect to how well a product works" meant that "state common-law claims about target area crop damage are not preempted." 79 S.W.3d 21, 23 (Tex. 2002). The Texas

(Cont'd)

pre-empted by the provision. An interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. We resort to principles of implied preemption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law—only when Congress has been silent with respect to pre-emption." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 532 (Blackmun, J., concurring in part and dissenting in part) (internal quotations omitted).

high court reasoned, "EPA regulations define the domain expressly preempted" by FIFRA because Congress gave the EPA the "role of evaluating and determining the content of pesticide labels." *Id.* at 24 (citing 7 U.S.C. 136w(a)(1) (West 2002)) (internal quotation omitted).

We find *Geye* unhelpful because it did not address the principal issue: whether the scope of FIFRA's express preemption clause includes product effectiveness claims which relate to product labeling. *Geye* holds only that the specific Texas state-law claims for crop damage did not present a problem of conflict preemption under the applicable EPA regulations. In other words, *Geye* proceeds from the assumption that the claims at issue did not relate to product labeling and that FIFRA's express preemption clause did not apply.[13]

The scope of FIFRA's express preemption clause is defined by the simple text of § 136v. That the EPA has not elected to impose labeling regulations concerning product

13. That *Geye* is properly understood as an ordinary conflict-preemption case is evident from two portions of the opinion. First, in the opening paragraphs of its opinion, the Texas court references only the "exception to preemption" clause of FIFRA. *American Cyanamid Co. v. Geye*, 79 S.W.3d 21, 22 (Tex. 2002). By the "exception to preemption" clause, the court was clearly referring to § 136v(a), not to the express preemption clause of § 136v(b). Second, it is also apparent from Part V of its opinion, in which the court appeared to conclude that the underlying claim alleged to be preempted was not a claim "relating directly or indirectly to labeling," *see* 79 S.W.3d at 29 (distinguishing *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995)), that the court's opinion did not purport to interpret section 136v(b).

effectiveness does not alter the plain meaning of § 136v(b) nor avoid preemption of a claim that has the effect of imposing labeling requirements. For a state to create a labeling requirement by authorizing a claim linked to the specifications of a label, even where the EPA has elected not to impose such labeling requirements, would clearly be to impose a requirement "in addition to or different from those" required under FIFRA. *See* 7 U.S.C. § 136v(b). Thus, the farmers' claims, including those which challenge Strongarm's effectiveness, are within the scope of FIFRA's express preemption clause if they are related to the content of the Strongarm label.

2) The Farmers' Claims are Sufficiently Related to the Content of Strongarm Label

The farmers argue that their claims are not related to the Strongarm label. This argument betrays the facts and it betrays common sense. We have observed that FIFRA's express preemption clause is self-executing. Thus, the farmers' claims are expressly preempted under § 136v(b) if a judgment against Dow would induce it to alter its product label. *See Andrus*, 178 F.3d 395, 399 (5th Cir. 1999) (finding that state law claims that herbicide had "failed to perform as specified pursuant to the label" were preempted by FIFRA because the plaintiff's success on such claims would necessarily have had the effect of "imposing additional labeling standards").

The facts aside for one moment, a claim's relatedness to a product label may be determined simply by reference to the party's pleadings. *See id.*, at 399. Unlike *Andrus*, where

the plaintiff's complaint specifically referenced "specifications set forth in the label," the farmers' counterclaim simply asserts in general that the label did not include a valid disclaimer or limitation of remedies. We, therefore, look at each of the farmers' state claims[14] to determine whether a judgment against Dow would cause it to need to alter the Strongarm label. *See MacDonald*, 27 F.3d at 1024 ("[C]ourts must compare the particular language of a statute's preemption provision with each common law claim asserted to determine whether the common law claim is in fact preempted.").

a) Breach of Warranty, Fraud and DTPA

The farmers base their breach of warranty, fraud, and DTPA claims on misleading comments made by Dow retailers. Claims for breach of warranty based upon an "off label" representation are preempted by FIFRA only if the representation deviates from the contents of the product label. *See Andrus*, 178 F.3d at 399. Success on such an "off label" claim would provide a manufacturer with a strong incentive to alter its label to avoid future liability. *See id.*

The district court found that the farmers failed to establish a genuine issue of material fact that the Dow retailers' comments differed or strayed in any material manner

14. Although the farmers asserted breach of contract in their counterclaim, they failed to address this issue in their brief. Thus, any objection related to the district court's finding of preemption regarding breach of contract is waived. *See Oden v. Oktibbeha County, Miss.*, 246 F.3d 458, 470 n.12 (5th Cir. 2001).

from the contents of the Strongarm label.[15] After reviewing the record, we agree with the district court. Thus, the farmers' warranty claims are preempted under § 136v(b). *See id.* at 400 (refusing to overturn a grant of summary judgment on a defense of preemption where the plaintiffs failed to establish that the representations forming the basis of the claim differed from the contents of the FIFRA label).

The farmers' fraud claims, based upon the same "off label" statements by Dow representatives, are subject to an identical analysis. Because no evidence was presented demonstrating that the retailer statements deviated from the contents of the Strongarm label, the fraud claims are similarly preempted by § 136v(b).

The DTPA does not create a warranty; rather, it establishes a remedy for the breach of an independent warranty. *See Centex Homes v. Buecher*, 95 S.W.3d 266, 269 (Tex.2002). Because the only warranty at issue is based upon these "off-label" comments, the farmers' success on a DTPA action would also induce Dow to alter its label. The DTPA claim is thus necessarily preempted by FIFRA § 136v(b).

15. The district court held that one pre-sale representation by Dow retailers deviated from the content of the Strongarm label. The court found that the representation, however, was controlled by the label's "Limitation of Remedies" provision. The farmers' do not seek appellate review of the district court's application of the "limitation of remedies" provision.

b) Defective Design

Defectively manufactured or designed products properly labeled under FIFRA are generally subject to state regulation. *See Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 899 (8th Cir. 2002). Dow, however, correctly contends that the farmers' defective design claim is merely a disguised claim for failure to warn. *See Grenier v. Vermont Log Buildings, Inc.*, 96 F.3d 559, 564 (1st Cir. 1996) ("[M]erely to call something a design or manufacturing defect claim does not automatically avoid FIFRA's explicit preemption clause."). One cannot escape the heart of the farmers' grievance: Strongarm is dangerous to peanut crops in soil with a pH level over 7.0, and that was not disclosed to them.

In *Netland*, the Eighth Circuit evaluated a FIFRA preemption defense to a strict liability claim. *See Netland*, 284 F.3d at 899. The *Netland* court found that the plaintiff's expert testimony was insufficient to establish a design defect, and that the claim was obviously more directed to deficiencies in the EPA-approved label. *See id.* at 900-01.

Netland is a good guide for us. The farmers' counterclaim presents a straightforward design defect claim, that Strongarm was unreasonably dangerous at the time it left Dow's control. Nonetheless, the farmers did not claim that Strongarm is unreasonably dangerous for use on all peanut crops; rather, they asserted that Strongarm is dangerous when applied to crops in soil with high pH levels. *See Grenier*, 96 F.3d at 565 (finding plaintiff's claim that a product was defectively designed because it was foreseeable that it would be used in

a particular way "is effectively no more than an attack on the failure to warn against [that] use and therefore is a preempted claim").

We find that the farmers' strict liability counterclaim is functionally a disguised claim for failure to warn. It is inescapable that success on this claim would again necessarily induce Dow to alter the Strongarm label. The district court did not err in ruling that FIFRA expressly preempts the farmers' defective design claim.

c) Negligence

The farmers also maintain that Dow was negligent in the testing, manufacture, and production of Strongarm. They overlook that a negligent testing claim is, as a matter of Texas law, a variation of an action for failure to warn. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997). We agree with the district court that the farmers' negligent manufacture claim was, again, simply a disguised claim for failure to warn and is preempted by § 136v(b).

III.

Each of the farmers' claims exceeded the $75,000 statutory requirement for federal diversity jurisdiction. Moreover, the district court conducted a proper *Trejo* abstention analysis. Given that the balance of the *Trejo* factors does not appear to point clearly toward abstention, we find that the district court did not abuse its discretion by entertaining the declaratory judgment action. We reiterate that, because FIFRA's express preemption clause is self-executing,

Appendix A

FIFRA preemption of performance-related state law claims is not dependent upon the existence of conflicting EPA regulations. Moreover, the farmers' claims for breach of warranty, fraud, DTPA, defective design and negligence are all preempted by FIFRA's express preemption clause because success on such claims would necessarily induce Dow to alter its product label. AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION DATED AND FILED JUNE 3, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. 5:01-CV-331-C

DOW AGROSCIENCES, LLC,

Plaintiff,

v.

DENNIS BATES, et al.,

Defendants.

ORDER

On this day the Court considered Plaintiff's Motion for Summary Judgment filed March 13, 2002. Defendants filed a Response to Plaintiff's Motion to Dismiss on April 2, 2002. Plaintiff filed a Reply on April 19, 2002. After considering all relevant arguments and evidence, the Court **GRANTS** Plaintiff's Motion for Summary Judgment.

Appendix B

I.

BACKGROUND

Plaintiff, Dow AgroSciences, manufactures pest management and biotechnology products. Plaintiff introduced Strongarm in the spring of 2000. Strongarm is used as a preemergence herbicide to control certain weeds in peanuts. Plaintiff began receiving demand letters from individual peanut growers (Defendants) contending that Strongarm was "highly toxic" and failed to control the weeds in their peanut crops. The Defendants also contended that Plaintiff misrepresented the product and that the misrepresentations constituted false, misleading, and deceptive acts and practices. In addition, Defendants alleged false advertising, breach of warranty, and statutory claims for alleged deceptive and fraudulent trade practices. Defendants' demand letters demanded payment from Plaintiff for certain damages, including consequential and incidental damages, treble damages, and attorneys' fees and expenses. On December 21, 2001, Plaintiff brought suit seeking declaratory judgment.

II.

STANDARD

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v.*

Appendix B

Liberty Lobby, Inc., 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. Fed.R.Civ.P. 56(e); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993). To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.*

III.

DISCUSSION

Plaintiff filed this suit in an effort to have the Court determine the parties' rights and obligations under the applicable federal law. Plaintiff contends that the Federal

Insecticide, Fungicide and Rodenticide Act ("FIFRA") expressly preempts all of Defendants' claims against Plaintiff. Defendants assert that their claims are not expressly preempted by FIFRA.

FIFRA creates a comprehensive regulatory scheme for pesticide and herbicide labeling. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). Under its provisions, all herbicides sold in the United States must be registered with the Environmental Protection Agency ("EPA"). *See* 7 U.S.C. § 136a(a). FIFRA also establishes a complex process of EPA review that culminates in the approval of the label under which the product is marketed. *See* 7 U.S.C. § 136a(c). A pesticide manufacturer must submit a "statement of all claims to be made for" the herbicide as well as directions for its use, its ingredients, and its adverse effects. *See* 7 U.S.C. § 136a(a). The EPA then registers the herbicide if it determines that its composition is such as to warrant the proposed claims for it, that its labeling complies with FIFRA requirements, and that it will perform its intended function without unreasonable adverse effects on the environment. *See* 7 U.S.C. § 136a(c)(5). In an effort to preserve uniformity of laws concerning labeling, FIFRA provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under" FIFRA. *See* 7 U.S.C. § 136v(b). Section 136v(b) preempts those state laws that impose or effect different or additional labeling requirements. *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994) The express language of FIFRA clearly indicates that Congress intended that the federal act preempt

conflicting state law, including state common law tort claims. *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994).

Plaintiff's first assertion is that FIFRA expressly preempts Defendants' alleged breach of implied warranty claims. Defendants on the other hand claim that FIFRA does not preempt their implied warranty claims because these claims are not based on inadequacies in labeling. Defendants claim that the alleged breach of implied warranty claims arise from field day projects sponsored by Plaintiff. Defendants allege that at the field day projects, they were told that Strongarm was an excellent herbicide to use for weed control on West Texas Peanuts. The Court finds that FIFRA preempts Defendants' breach of implied warranty claims because "[i]n every instance the defects alleged [by Defendants] are linked to the specifications set forth in the label." *Andrus v. Agrevo USA Co.*, 178 F.3d 395, 399 (5th Cir. 1999). Defendants attempt to avoid FIFRA preemption because they "challenge misrepresentations that were made separately from the label." *See Andrus*, 178 F.3d 395, 400 (quoting *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997)). Defendants' argument fails as Defendants have failed to raise a genuine issue of material fact suggesting that the advice and statements made at the field day projects differed from the contents of the Strongarm product label. The implied warranty claims are preempted by FIFRA because they challenge the Strongarm label.

Plaintiff also asserts that FIFRA preempts Defendants' alleged breach of express warranty claims. Defendants claim that because express warranties are not a requirement

imposed by a state, they are not preempted under FIFRA. However, premising liability on the inaccuracy of a statement on the label is in effect challenging the label, and FIFRA preempts any claim that directly or indirectly challenges the sufficiency of the label. The express warranty claims are preempted by FIFRA because they challenge the Strongarm label.

Additionally, Plaintiff claims that Defendants' alleged breach of implied and express warranty claims are foreclosed by Strongarm's label provisions. Strongarm's label provisions specifically disclaim any implied warranties and provide a limited express warranty.[1] In Texas, the UCC provides for the exclusion or modification of warranties. Tex. Bus. & Com. Code Ann. § 2.316(b) (Vernon 2000). Section 2.316(b) provides as follows:

> (b) Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing it must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be writing and conspicuous. Language to exclude all

1. Strongarm's label provides as follows: "Dow AgroSciences warrants that this product conforms to the chemical description on the label and is reasonably fit for the purposes stated on the label when used in strict accordance with the directions, subject to the inherent risks set forth below". Dow AgroSciences MAKES NO OTHER EXPRESS OF IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER EXPRESS OR IMPLIED WARRANTY.

> implied warranties of fitness is sufficient if it states, for example "there are no warranties which extend beyond the description on the face hereof".

Whether a disclaimer is conspicuous or not is a question of law. Section 1.201(10) of the Texas Business and Commerce Code states that "a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals is conspicuous." Tex Bus. & Com. Code Ann. § 1.201(10) (Vernon Supp. 2002). Strongarm's label provision excluding any express or implied warranty meets the letter of the Texas UCC and thus is enforceable. Tex Bus. & Com. Code Ann. § 2.316(b); 2.316(b), (c) (Vernon 2000). Assuming *arguendo* that Defendants' claims for an alleged breach of express and implied warranties were not preempted by FIFRA, the claims would be foreclosed by Strongarm's label provisions. Plaintiff's Motion for Summary Judgment on Defendants' breach of implied and express warranty claims is **GRANTED.**

Plaintiff contends that Defendants' Deceptive Trade Practices Act and Fraud claims are preempted by FIFRA because these claims ultimately challenge the Strongarm label. Plaintiff claims that Defendants' DTPA and fraud claims are in essence misrepresentation through advertising claims which are challenges to the Strongarm label. Defendants deny that their DTPA and fraud claims are predicated solely on advertisements. Defendants assert that their claims arise from the representations made by Plaintiff's retail distributors and employees who conducted the field day projects and who instructed Defendants about the uses

of Strongarm and from promotional advertising by Plaintiff. Defendants claim that their DTPA and fraud claims are based on the representations and promises made by Plaintiff's authorized local retail distributors and representatives.

Controlling Fifth Circuit law establishes that FIFRA preempts claims that rely on advertising and marketing materials as the basis for their DTPA and fraud claims. *Andrus*, 178 F.3d at 400. Specifically, the Fifth Circuit has held that FIFRA preemption cannot be avoided "simply because [he] challenge[s] alleged misrepresentations that were made separately from the label." *Andrus*, 178 F.3d at 400 (citing *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997)). Defendants state that their claims arise from representations made by Plaintiff's retail distributors and employee representatives who conducted field day projects and "held meetings with the Defendant growers instructing them about the uses of Strongarm, how to apply it, extolling its excellent results in west Texas soils with west Texas weeds and from promotional advertising" by Plaintiff. Defendant has offered no evidence that these "off-label" remarks were different from the information contained in the Strongarm label. *See Andrus*, 178 F.3d at 400 (citing *Kuiper*, 131 F.3d at 662-63). Off-label remarks are preempted when they merely repeat the information on the label. *See id.* These remarks Defendants complain of merely repeat the information contained on the Strongarm label; therefore, FIFRA preempts these claims.

Defendants also complain about statements made by Plaintiff's employee representatives who examined the Defendants' fields and advised them that the peanuts would

grow out of the problem and that Plaintiff would pay the growers for any production loss and increased expenses. These off-label remarks do not repeat any information found on the Strongarm label. FIFRA does not preempt these claims. However, the Strongarm label contained a Limitation of Remedies provision. The provision provides as follows:

"The exclusive remedy for losses or damages resulting from the use of this product (including claims based on contract, negligence, strict liability, or other legal theories) shall be limited to, at Dow AgroSciences' election, one of the following:

1. refund of purchase price paid by buyer or user for product bought, or

2. replacement of amount of product used."

Dow AgroSciences shall not be liable for losses or damages resulting from handling or use of this product unless Dow AgroSciences is promptly notified of such loss or damage in writing. In no case shall Dow AgroSciences be liable for consequential or incidental damages or losses.

The Terms of the Warranty Disclaimer above and this Limitation of Remedies cannot be varied by any written or verbal statements or agreements. "No employee or sales agent of Dow AgroSciences or the sell is authorized to vary or exceed the terms of the Warranty Disclaimer or this Limitation of Remedies in any manner."

Appendix B

Section 2.719 of the Texas Uniform Commercial Code provides that parties can limit their liability in damages. Tex Bus. & Com. Code Ann. § 2.719. The Limitation of Remedies on the Strongarm label complies with the Texas UCC. As such, the alleged statements made by the Plaintiff's employees and representatives do not vary the terms of the Limitation of Remedies. Defendants are limited to the remedies provided in the Limitation of Remedy provision.

Plaintiff's final assertion is that Defendants' negligence claims are preempted by FIFRA. Defendants argue that Plaintiff was "negligent in the development, manufacture, production and promotion of Strongarm." In support of their argument, Defendants claim that the affidavit of John M. Brown, Ph.D. demonstrates that Plaintiff was negligent in the design, formulation, manufacture, and promotion of Strongarm in west Texas. In addition, Defendants claim that the fact that Plaintiff changed the Strongarm label for the 2001 peanut season supports their assertion that Plaintiff was negligent in the design, formulation, manufacture, and promotion of Strongarm. Defendants further state that had the 2001 label changes been made in 2000, "the growers would not have used Strongarm and would not have suffered the injuries to their crops that they did." In effect, the Defendants are challenging the Strongarm label. The Defendants' negligence claim is in actuality a failure to warn claim that is preempted. *Cipolone v. Liggett Group*, 505 U.S. 504, 524 (1992). Plaintiff's Motion for Summary Judgement on this point is **GRANTED.**

Appendix B

IV.

CONCLUSION

For the reasons previously discussed, Plaintiff's Motion for Summary Judgment is **GRANTED.** All other pending motions are DENIED as MOOT. All relief not expressly granted is **DENIED.**

SO ORDERED.

Dated this 3rd day of June, 2002.

s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE